

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE

Assigned on Briefs October 30, 2007

**PATRICK THURMOND v. HOWARD CARLTON, WARDEN**

**Appeal from the Criminal Court for Johnson County**  
**No. 4973     Lynn W. Brown, Judge**

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**No. E2007-00112-CCA-R3-HC - Filed December 12, 2007**

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The pro se petitioner, Patrick Thurmond, appeals the Johnson County Criminal Court's summary dismissal of his petition for a writ of habeas corpus. The petitioner was convicted by a Davidson County jury of one count of aggravated burglary, two counts of aggravated rape, one count of attempted aggravated rape, and one count of aggravated sexual battery for which he received a total effective sentence of fifty years. In this, his second petition for a writ of habeas corpus, the petitioner claims that his judgments are void due to the state's failure to elect offenses at trial. The trial court summarily dismissed the petition for failure to state a cognizable claim. Following our review, we affirm the judgment of the trial court.

**Tenn. R. App. 3 Appeal as of Right; Judgment of the Criminal Court is Affirmed**

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which DAVID H. WELLES, and DAVID G. HAYES, J.J., joined.

Patrick Thurmond, Mountain City, Tennessee, Pro Se.

Robert E. Cooper, Jr., Attorney General & Reporter and David H. Findley, Assistant Attorney General, for appellee, State of Tennessee.

**OPINION**

This court affirmed the petitioner's convictions on direct appeal. State v. Patrick Thurmond, No. 01C01-9802-CR-00076, 1999 WL 787524 (Tenn. Crim. App. Oct. 5, 1999). In his first petition for a writ of habeas corpus, the petitioner successfully attacked his judgments based upon an illegal offender classification. Thurmond v. Carlton, 202 S.W.3d 131 (Tenn. Crim. App. 2006). In this second petition, the petitioner alleges that his judgments are void due to the state's failure to elect offenses. The habeas corpus court summarily dismissed the petition for writ of habeas corpus based upon its finding that the petitioner's claim regarding the state's failure to elect offenses was not cognizable in a habeas corpus proceeding. On appeal, the petitioner claims that the state failed to

elect offenses rendering the judgments of conviction void. The state counters that the petitioner is not entitled to habeas corpus relief because the petitioner's claim, even if taken as true, would render the judgment merely voidable and not void.

### ANALYSIS

Tennessee law provides that "[a]ny person imprisoned or restrained of his liberty under any pretense whatsoever . . . may prosecute a writ of habeas corpus to inquire into the cause of such imprisonment." Tenn. Code Ann. § 29-21-101. Habeas corpus relief is limited and available only when it appears on the face of the judgment or the record of proceedings below that a trial court was without jurisdiction to convict the petitioner or that the petitioner's sentence has expired. Archer v. State, 851 S.W.2d 157, 164 (Tenn. 1993). To prevail on a petition for a writ of habeas corpus, a petitioner must establish by a preponderance of the evidence that a judgment is void or that a term of imprisonment has expired. See State ex rel. Kuntz v. Bomar, 214 Tenn. 500, 504, 381 S.W.2d 290, 291-92 (1964). If a petition fails to state a cognizable claim, it may be dismissed summarily by the trial court without further inquiry. See State ex rel. Byrd v. Bomar, 214 Tenn. 476, 483, 381 S.W.2d 280, 283 (1964); Tenn. Code Ann. § 29-21-109. We note that the determination of whether to grant habeas corpus relief is a matter of law; therefore, we will review the trial court's finding de novo without a presumption of correctness. McLaney v. Bell, 59 S.W.3d 90, 92 (Tenn. 2001).

The petitioner's allegation regarding the state's failure to elect offenses at trial would render the convictions voidable and not void. See John Haws Burrell v. Howard Carlton, Warden, No. E2002-01613-CCA-R3-PC, 2003 WL 22381171, at \*1 (Tenn. Crim. App. Oct. 17, 2003) (citing Passarella v. State, 891 S.W.2d 619, 627 (Tenn. Crim. App. 1994)). Thus, the allegation is not cognizable in a habeas corpus proceeding. Therefore, we conclude that the trial court correctly dismissed the petition for a writ of habeas corpus.

### CONCLUSION

Upon thorough review, we conclude that the trial court correctly dismissed the petition for a writ of habeas corpus. The judgment of the trial court is affirmed.

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D. KELLY THOMAS, JR., JUDGE